No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, APPELLANT

v.

McKESSON & ROBBINS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
JOHN RODNER, JR.,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York denying appellant's motion for summary judgment is reported in 122 F. Supp. 333. The opinion of the court dismissing the complaint is not yet reported. Both opinions are set forth in the Appendix, *infra*, pp. 1a-21a. The court did not enter any separate judgment of dismissal.

JURISDICTION

This suit was brought under Section 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. 4, commonly known as the Sherman Act, to enjoin violations of Section 1 of that Act. The judgment

of the district court was entered on June 6, 1955, and the notice of appeal was filed in that court on August 5, 1955. The jurisdiction of this Court to review by direct appeal the judgment entered in this case is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *United States* v. *U.S. Gypsum Co.* 333 U.S. 364; *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707.

STATUTES INVOLVED

Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended 50 Stat. 693, 15 U.S.C. 1, commonly known as the Sherman Act, provides in part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agree-

ments of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor

* * *

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of July 14, 1952, 66 Stat. 632, commonly known as the McGuire "Fair Trade" Amendment, 15 U.S.C. 45(a), provides in part as follows:

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

* * * *

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

QUESTION PRESENTED

Section 5(a) of the Federal Trade Commission Act, the so-called McGuire "fair-trade" amendment, exempts from the antitrust laws manufacturers' resale price-maintenance agreements which are valid under State law. The exemption does not apply, however, to agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other." The question presented by this appeal is whether the McGuire amendment exempts from the antitrust laws resale price-maintenance agreements between a manufacturer and independent wholesalers where the manufacturer itself makes substantial wholesale sales in direct competition with the independent wholesalers.

STATEMENT

McKesson & Robbins, Inc. ("McKesson") is both a wholesaler and a manufacturer of drug products. The major part of its business consists of wholesaling drug products manufactured by other concerns.[1] In addition, McKesson manufactures a line of its own trade-marked drug products, which it distributes primarily by direct wholesale sales, but also by sale to independent wholesalers.[2] The latter compete with McKesson's own wholesale and manufacturing divisions in selling McKesson-brand products to retail outlets.

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[1] McKesson is the largest wholesale druggist in the United States; its wholesale sales for the year ending March, 1954, totalled $338,000,000. McKesson's wholesale division operates a nation-wide network of 74 wholesale outlets in 35 states.

[2] For the year ended June 30, 1952 total sales of McKesson's own brand products were approximately $11,000,000. The independent wholesalers sold $963,000 of this amount.

McKesson sells its own products to the independent wholesalers under resale price-maintenance contracts which require the wholesalers, in reselling such products, to adhere to the prices fixed by McKesson.

On May 27, 1952, the Government filed a complaint charging that McKesson's resale price-maintenance contracts with the independent wholesalers constituted illegal price-fixing in violation of Section 1 of the Sherman Act, and seeking injunctive relief. McKesson admitted the use of such contracts, but claimed that they were exempted from the Sherman Act by the Miller-Tydings and McGuire Acts. The Government moved for summary judgment on the ground that the exemption provided by those Acts does not immunize McKesson's "fair trade" agreements, since it does not cover contracts "between wholesalers" or "between persons, firms, or corporations in competition with each other."

The district court (Judge Murphy) denied the motion. Although the court recognized that "direct price-fixing" is illegal *per se* under the Sherman Act, it was "unwilling, at this stage of case law development of legislatively sanctioned resale price fixing, to hold illegal *per se* fair trade agreements because the producer is also a wholesaler in the absence of showing some injury, inchoate or consummate, to competition." The court stated that since Congress had legalized "fair trade" agreements between manufacturers and wholesalers or retailers, "the *per se* judicial condemnation of direct price fixing is hardly appli-

cable simply because the producer is also a wholesaler." The "true test of legality" of "fair trade" agreements by a "producer-wholesaler of dual capacity," the court held, "is whether some *additional* restraint destructive of competition is occasioned."

The case then proceeded to trial before Judge Clancy. The Government sought to prove an "additional restraint" on competition by showing that McKesson gave certain large drug chains special discounts from its published wholesale prices on its own products. On June 3, 1955, Judge Clancy rendered an opinion holding that the Government had failed to prove any "additional restraint," and dismissed the complaint. He "concur[red] in and adopt[ed]" Judge Murphy's "ruling" that "fair trade price fixing by a producer-wholesaler was not *per se* illegal under the Sherman Act." Judge Clancy held that the Government's evidence that McKesson had given special discounts to certain purchasers did not establish an "additional restraint," since there was "nothing" in such evidence "which would support a finding by this Court that this difference of discount by itself or in conjunction with defendant's fair trade price structure in any way restricts competition more than does any fair trade price system."

THE QUESTION IS SUBSTANTIAL

This appeal presents an important statutory question under the antitrust laws which has not been, but should be, resolved by this Court. The question is whether the McGuire Act authorizes a

manufacturer which also wholesales its own products to enter into resale price-maintenance agreements with independent wholesalers to whom it distributes those products and with whom it competes in selling them at wholesale. The court below held that such contracts are legal unless they impose some "additional restraint" upon competition over and above their price-fixing effect. We submit, however, that the McGuire Act does not exempt such contracts from the Sherman Act, and that they are *per se* illegal without regard to whether they impose any additional restraint on competition.

1. Although price-fixing agreements generally are illegal *per se* under Section 1 of the Sherman Act (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392), the Miller-Tydings and McGuire Acts exempt from the antitrust laws resale price-maintenance agreements which cover brand or trade-marked goods and which are valid under state law. But that exemption is only a "limited" one,[3] and it specifically does not apply to price-fixing agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other." Such agreements, like other forms of horizontal price-fixing among sellers at the same distributive level, remain fully subject to the prohibitions of the Sherman Act.

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[3] *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 388.

Cf. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373.

A manufacturer which distributes its own products directly to retailers functions not only as a manufacturer but also as a wholesaler. McKesson has a substantial volume of direct wholesale sales, and the resale price-maintenance contracts between it and the independent wholesalers are, we submit, contracts "between wholesalers" and therefore not within the exemption of the McGuire Act. Moreover, since there are substantial market areas where McKesson competes as a wholesaler with the independent wholesalers, the contracts are also outside the McGuire Act exemption because they are between firms "in competition with each other." The fact that McKesson also is the manufacturer of the products which it wholesales does not alter its status as a wholesaler in relation to other wholesalers with whom it competes.

The McGuire Act creates an exception to the general rule that all price-fixing is *per se* illegal under the Sherman Act. The legislative history of the Act is, as Judge Murphy pointed out, inconclusive on the question whether Congress intended to exempt from the antitrust laws price-fixing by so-called integrated manufacturers. In the absence of any affirmative legislative history clearly showing that Congress specifically intended to immunize price-fixing by an integrated manufacturer, we submit that the Act should be strictly construed to limit the exemption to manufacturers whose "fair trade" agreements involve only vertical

price-fixing. Cf. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389-390, 395; *United States v. Masonite Corp.*, 316 U.S. 265, 279-280.[4]

The economic consequences of "fair trade" agreements by integrated manufacturers further support the view that the McGuire Act does not legalize such price-fixing. Under a "fair-trade" pricing system, a non-integrated manufacturer generally sets its resale prices at a level geared to the marketing costs of the independent resale outlet of average efficiency. See Wilcox, *Public Policies Toward Business*, p. 421 (1955); Fulda, *Resale Price Maintenance*, 21 U. of Chi. L. Rev. 175, 189-91 (1954). But an integrated manufacturer is likely to fix resale prices primarily in relation to its own outlets, and if those are inefficient the price thus fixed will tend to be higher than it would be if the manufacturer were not also distributing its own products. See Note, 64 Yale L. J. 426, 431 (1955). Furthermore, a manufacturer which wholesales a substantial volume of its products, such as McKesson, may be encouraged to fix higher resale prices, since the extra profits from the distributive end of the business can be used to offset any drop in manufacturing profits which the higher prices may produce by reducing volume. Thus, there is some

[4] The Federal Trade Commission has held that the McGuire Act authorizes "fair trade" agreements by integrated manufacturers. *Eastman Kodak Co.*, 3 CCH Trade Reg. Rep. (10th ed.), ¶ 25,291 (1955); see also *Doubleday & Co.*, 3 CCH Trade Reg. Rep. (9th ed.), ¶ 11,515 (1953).

economic basis for the view that "fair trade" agreements by integrated manufacturers are more likely to result in higher prices to the consumer than such agreements by non-integrated manufacturers.

2. The question whether the McGuire Act exempts "fair trade" agreements by integrated manufacturers from the antitrust laws calls for a simple "yes" or "no" answer. Neither the language of the Act nor its legislative history afford any basis for the holding of the district court that such agreements are illegal under the Sherman Act only if some "additional restraint" upon competition can be shown.

Price-fixing is illegal *per se*, and unless the McGuire Act exemption covers integrated manufacturers, their "fair trade" contracts are prohibited. Cf. *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 721. If, on the other hand, the exemption does cover such contracts, the existence of some "additional restraint" would be immaterial since it would not destroy the exemption. The vice of "fair trade" agreements by integrated manufacturers is that they eliminate price competition between persons at the same distributive level, and that evil results from the price-fixing without more. The district court's test of additional restraint is not only unduly vague, but appears to inject a sort of "rule of reason" into determining the legality of price-fixing—a concept which this Court repeatedly has rejected.

CONCLUSION

The question presented by this appeal is substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
JOHN BODNER, JR.,
Attorneys.

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